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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

73-841

HON. CALE J. HOLDER,
United States District Judge for the Southern District of Indiana,
Petitioner,

v.

ARTHUR BANKS,
Respondent.

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INDEX

	Page
Jurisdiction	1
Constitutional Provisions, Court Rules and Ethical Standards Involved	2
The Questions Presented	5
Statement of the Case	6
Summary of Argument	12
I. The Sixth Amendment Does Not Impair the Authority of a Trial Court to Deny Leave to Unadmitted Counsel to Appear *Pro Hac Vice* Because of Conduct Contrary to the Court's Rules and the Ethical Standards of the Profession	13
II. The Ethical Standards Here in Issue Are Compatible With the First Amendment	23
A. The Rules Against Pretrial Publicity by Counsel in a Criminal Case	23
B. The Incitations to Demonstrate and Fill the Courtroom	36
Conclusion	40
Exhibit A—	
2/5/74 Decision of United States District Court for the Northern District of Illinois, *Chicago Council of Lawyers, et al* v. *William J. Bauer,* No. 70-C-2194	A1

TABLE OF AUTHORITIES CITED

Cases

Page

Atchison, Topeka & Santa Fe Ry. Co. v. *Jackson*, 235 F.2d 390, 393 (10th Cir. 1956) 19

Bridges v. *California*, 314 U.S. 252, 263 (1941) 23, 36

Chandler v. *Fretag*, 348 U.S. 3, 9 (1954) 17

Chase v. *Robson*, 435 F.2d 1059 (7th Cir. 1970) 31, 32, 41

Chicago Council of Lawyers et al v. *William J. Bauer* 70-C-2194 (N.D.Ill. 1974) 33

Cooper v. *Hutchinson*, 184 F.2d 119, 122 (3rd Cir. 1950) 15, 16

Cox v. *Louisiana* (No. 2), 379 U.S. 559 (1965) 39, 40

Craig v. *Harney*, 331 U.S. 367, 373 (1947) 23, 36

Estes v. *Texas*, 381 U.S. 532 (1965) 35, 38

In re Henry, 40 N.Y. 560 (1869) 14

In re Pierce, 189 Wis. 441, 207 N.W. 966 (1926) 14

In re Sawyer, 360 U.S. 622 (1959) 28, 29, 30, 41

Magee v. *Superior Court*, 8 Cal.3d 949, 106 Cal. Rptr. 647, 506 P.2d 1023 (1973) 17, 41

Manning v. *Roanoke & T.R. Co.*, 122 N.C. 824, 28 S.E. 963 (1898) 14

Matzer v. *Brown*, 288 F.Supp. 612 (D. N.J.). *aff'd*, 410 F.2d 1376 (3rd Cir. 1969) *cert. denied*, 296 U.S. 1015 (1970) 16, 20

Parker v. *Parker*, 97 So.2d 136 (Fla. Ct. of App. 1957) 19

Pennekamp v. *Florida*, 328 U.S. 331 (1946) 23, 36

People of the State of New York v. *Epton*, 248 F.Supp. 276, 277 (S.D.N.Y.) 1965 14

Reickhauer v. *Cunningham*, 299 F.2d 170, 172 (4th Cir. 1962) 17

Page

Sanders v. *Russell*, 401 F. 2d 241 (5th Cir. 1968) 19

Sheppard v. *Maxwell*, 384 U.S. 333 (1966) 24, 26, 33, 36, 41

Spanos v. *Skouras Theatres Corp.*, 364 F.2d 161, 168 (2d Cir. en banc, 1966), *cert. denied*, 385 U.S. 987 (1966) 19

State v. *Kavanaugh*, 52 N.J. 7, 243 A.2d 225, 231 (1968), *cert. denied, sub nom. Matzner* v. *New Jersey*, 393 U.S. 924 (1968) 19, 20

State v. *Van Duyne*, 43 N.J. 368, 204 A.2d 841, 852, 11 A.L.R.3d 1086, 1102 (1964) 24, 25

Thomas v. *Cassidy*, 249 F.2d 91, 92 (4th Cir. 1957), *cert. denied sub nom. Fitzgerald* v. *Cassidy*, 355 U.S. 958 (1938) 14

United States v. *Bergamo*, 154 F.2d 31, 35 (3rd Cir. 1946) 16

United States v. *Cozzi*, 354 F.2d 637, 639 (7th Cir.), *cert. denied*, 383 U.S. 911 (1966) 18

United States v. *Dickinson*, 465 F.2d 496, 505 (5th Cir. 1972) 28

United States v. *DiStephano*, 464 F.2d 845, 846 n. 1 (2d Cir. 1972) 18

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United States v. *Pigford*, 461 F.2d 648 (4th Cir. 1972) 18

United States v. *Tijerina*, 412 F.2d 661, 663 n. 1, 666 (10th Cir. 1969) 32, 41

United States ex rel. Carey v. *Rundle*, 409 F.2d 1210, 1215 (3rd Cir. 1969), *cert. denied*, 397 U.S. 946 (1970) 13, 17, 18

Wood v. *Georgia*, 370 U.S. 375, 384-385 (1962) 23

Youmans v. *Hanna*, 35 N.D. 479, 160 N.W. 705 (1916) 14

Miscellaneous

Page

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Canons of Professional Ethics, Canon 20 24

Code of Professional Responsibility
DR 1-102(A)(5) 4, 37, 38
DR 7-107(B) 4, 5, 23, 25, 26
EC 7-33 ..... 4, 24
EC 7-36 ..... 4, 37

Constitution of the United States
First Amendment 2, 22-40
Sixth Amendment 2, 13-22

Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 395, 397, 400, 401, 407 (1969) (Kaufman Committee Report) 26-27

Rules of the District Court for the Southern District of Indiana
1(F) 2
27 ..... 2, 23, 25, 34, 36

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ARTHUR BANKS,
Respondent.

BRIEF OF PETITIONER

Petitioner, the Hon. Cale J. Holder, Judge of the United States District Court for the Southern District of Indiana, respectfully petitions this Court to review the decision of the United States Court of Appeals in an original action for mandamus captioned Arthur Banks v. Hon. Cale J. Holder, Cause No. 73-1332.

JURISDICTION

The Court of Appeals rendered its original decision on May 17, 1973 (Exhibit A to Petition For Writ of Certiorari) and thereafter on Oct. 1, 1973, by a vote of four to three, denied a petition for hearing. (Exhibit B to Petition

For Writ of Certiorari). Neither decision is yet reported. On Oct. 5, 1973 Mr. Justice Rehnquist stayed the enforcement and effectiveness of the decision of the Court of Appeals. On Oct. 26, 1973 Mr. Justice Rehnquist granted petitioner an extension of time within which to file a petition for writ of certiorari to and including November 29, 1973. On November 28, 1973 petitioner filed his petition for writ of certiorari. On January 21, 1974 this Court granted the petition. This Court has jurisdiction to review the decisions of the Court of Appeals pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, COURT RULES AND ETHICAL STANDARDS INVOLVED

Amendment I to the United States Constitution:

> "Religious and political freedom.—Congress shall make no law . . . abridging the freedom of speech. . ."

Amendment 6 to the United States Constitution:

> "Rights of the accused. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed . . . and to have the assistance of counsel for his defense."

Rules of the United States District Court for the Southern District of Indiana:

> Rule 1(f). "The Canons of Ethics of the American Bar Association as from time to time existing shall be the standards of conduct for members of the Southern Indiana District Bar."
>
> Rule 27. "It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with

a fair trial or otherwise prejudice the due administration of justice."

"From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement for dissemination by any means of public communication, relating to that matter and concerning:

"(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

"(2) the existence of contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

"(3) the performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

"(4) the identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

"(5) the possibility of a plea of guilty to the offense charged or a lesser offense;

"(6) any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case."

American Bar Association's Code of Professional Responsibility and Canons of Judicial Ethics:

DR 1-102(A). "A lawyer shall not . . . (5) Engage in conduct that is prejudicial to the administration of justice."

EC 7-33. "A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an imparital tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established."

EC 7-36. "Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears.

DR 7-107. "(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

"(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

"(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

"(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

"(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

"(5) The identity, testimony, or credibility of a prospective witness.

"(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case."

QUESTIONS PRESENTED

1. The scope of a trial court's discretionary power to deny a criminal defendant's request that he be represented *pro hac vice* by an attorney not a member of that Court's bar and in particular

(a) whether delays in the arraignment and apparent delays in future proceedings attributable to chosen counsel warrants denial of the request.

(b) whether an attorney's violation of the rules of the Court and of the ethical standards of the legal profession warrants denial of the request, and

(c) whether such a denial is forbidden by the Sixth Amendment to the United States Constitution.

2. (a) whether the court rules and ethical standards which forbid an attorney in a criminal case from making extrajudicial statements on specific subjects for public dissemination are compatible with the First Amendment to the United States Constitution.

(b) whether an attorney's deliberate incitation of sympathizers to demonstrate and pack the courtroom was protected by the First Amendment to the United States Constitution.

STATEMENT OF THE CASE

This case commenced with the return of an indictment against respondent in the United States District Court for the Southern District of Indiana on December 14, 1972. Respondent, an inmate of the federal penitentiary at Terre Haute, Indiana, was charged with assaulting a guard at that institution. At the first arraignment held on December 20, 1972, respondent appeared and indicated that his counsel would be William M. Kunstler, having been engaged approximately one month previously. Because of Mr. Kunstler's absence at that hearing, the arraignment was continued at respondent's request. On January 2, 1973, another arraignment was attempted, but because of Mr. Kunstler's absence, the arraignment was continued again at respondent's request. On February 2, 1973, the respondent again came before the court for arraignment, but again Mr. Kunstler did not appear. The court then entered a plea of not guilty for respondent. On March 21, 1973, Mr. Kunstler filed an application for leave to appear on behalf of respondent. In response to a request by the government for a hearing on the application, petitioner held a hearing on April 1, 1973. At that hearing it was shown that Mr. Kunstler had on various occasions since February 9, 1973 (the date on which Mr. Kunstler states he became counsel for respondent) made in Terre Haute or Indianapolis the following statements to public audiences or to the news media concerning the pending criminal case:

> (1) "that it was his client Banks who was assaulted by the prison guards;
>
> (2) "that the charge against Banks is purely retaliative . . . a cheap little way of getting back at him for being a trouble-maker";
>
> (3) "that Mr. Kunstler was certain he (Banks) was brutalized by the guards,

(4) "that it is a common cover-up tactic in order to protect the guards to file charges against Banks;

(5) "that all the evidence is inside the prison walls, under the control of the authorities who brought the charges against Banks;

(6) "the word of a guard is always taken over that of an inmate;

(7) "that Banks got into all this trouble because he doesn't act like most of the black inmates who 'Uncle Tom' it inside;

(8) "that there is a lot of antagonism against Banks because his wife is white;

(9) "that Attorney Kunstler urged students at Terre Haute to organize demonstrations in support of Banks and to fill the courtroom with sympathetic spectators during the trial;

(10) "That 'Anything they can do to call attention to the trial will be welcomed. I am not asking them to blow up the courthouse but that would certainly draw attention.' (Exhibit G to Government's Motion to Correct)

(11) "that Mr. Kunstler was quoted as being proud to be associated with Mr. Banks as he represents the finest of the pacifist anti-war movement; (Exhibit A to Government's Answer)

(12) "that Mr. Banks is a black man who was sent to jail for his beliefs in the value of human life and the dignity of all people at a time when many who have much more to defend chose alternatives to incarceration;

(13) "that Mr. Kunstler sees this indictment as a political attack by the prison administration on an individual who firmly stands for his beliefs, who is articulate and a spokesman for "Black Liberation and Pacificism," and therefore a threat to the smooth-running oppression that is so much a part of prison life in this country today;

(14) "that Mr. Kunstler is quoted as saying, 'This case typifies the strategy used to quiet dissent among inmates, for the case is such that due process is virtually an impossibility.'

(15) "The moment he [Banks] went into prison he was doomed.' " (Exhibit H to Governments Motion to Correct)

(16) " 'the only successful way to defend your self against charges such as those against Banks is by creating a a [*sic*] complete support group around the trial, that includes demonstrations and making sure every court session has a full house and listing celebrities who are interested in the case . . . and Kunstler [*sic*] had a comment concerning draft evaders and the granting of amnesty. . . .' " (Exhibit I to Government's Motion to Correct)

Mr. Kunstler did not dispute these statements and expressed his right to make them and an intention to continue. Petitioner concluded that such public statements violated the rules of court and ethical standards of the legal profession concerning pretrial publicity, that such violations and Mr. Kunstler's indication that he would continue threatened a trial fair to both defendant and the public and the orderly administration of justice and on that basis together with a concern for Mr. Kunstler's delays in appearing for respondent denied Mr. Kunstler leave to appear. Opinion attached as Exhibit C to Petition for Writ of Certiorari. Thereafter, respondent brought the original action for mandamus in the Circuit Court of Appeals for the Seventh Circuit. While that action was pending Mr. Kunstler kept his promise to make more public statements concerning the case. At a promoted speech at the Indiana University Law School in Indianapolis Mr. Kunstler made the following statements:

"* * * I was denied in two other states the right to represent defendants in criminal cases; * * * The other was in the Circuit Court in Dade County, Florida, in

Miami, where a judge by the name of Murray Goodman refused to let me represent a young man named Alton Forbes, who is one of the defendants in the Vietnam Veterans Against the War conspiracy case to disrupt the Republican National Convention which will be starting in . . . very shortly. Some of you may have read that Judge Murray Goodman was indicted two weeks ago with the Mayor of Miami Beach for accepting bribes. . . . I don't raise that as the background of every one of the judges, though it wouldn't totally surprise me if that was the case, but I indicate that it is rather interesting that those who preach the righteous gospel so vigorously like Judge Murray Goodman and Al Capp to name two, are so frequently caught in the most horrendous of situations. Those of you who, that aren't familiar with Al Capp might be reminded that he just pleaded guilty to attempting to force young women to commit what the law so euphemistically describes as an act against nature . . . at a motel in Eau Claire, Wisconsin. That is another matter.

". . . On a personal level I was deeply shocked by it because it [the pending case involving respondent Banks] was the first time in any federal case that I ever heard a United States District Judge deny an attorney the right to represent the person who desires his services. It was done in a cold and crass and criminal manner by a judge [Holder] who, in doing so, committed a crime. He violated the civil rights of a defendant. Under any ordinary set of circumstances, if the law was just and honest, he should be indicted for what he did. He violated his oath of office; he violated his oath as a member of his profession, and he violated every tenet of human decency in doing it. * * * "

"Write a letter to the judge, write a letter to the newspapers. Picket the courthouse, do anything that will contribute to the issue."

"There is a committee here for Arthur Banks and anyone that wants any information about that can reach that committee through the law offices of Barnhart and Allison." (Exhibits C & D to Government's Answer)

Following the speech a taped interview was held with an Indianapolis radio station during which Mr. Kunstler made the following comments:

"* * * The Judge here, Judge Holder, has said that he is not going to permit me to appear in his Court, which means that I can't represent Arthur Banks, which means that I am disbarred as far as this Court is concerned, and he is doing it for no good reason whatsoever, other than his own innate prejudice against me. * * *"

". . . it would seem to me any lawyer worth his or her salt would be writing to the Editor, writing to the Bar Association, writing to the Judge, writing to the Court of Appeals for the Seventh Circuit, and saying, 'Look here, we may or may not agree with William M. Kunstler, but that is not the issue before us. The issue is, are we going to rape the Constitution by allowing a Federal Judge to do what the Constitution says he should never do, and that's to deprive a defendant of his right to an attorney of his choice.' "

"I don't think anyone should respect the law, not certainly as it's practiced in America."

"* * * It [the law] is neither fair nor just, because it's manipulated and utilized. . . . And in its own procedures and practices it's unfair as well; built in, deliberately, I think, into the system. I think the best use is to distrust it, strip it of all its mysticism; to demonstrate, to fill courtrooms, to confront it. * * *

We would think nothing peculiar at all about picketing Congress or picketing the Whie House—why not picketing the Court? * * *

"I think that the only answer in all of these systems, is confrontation. Physical confrontation. * * *" (Exhibit I to Government's Answer)

While the mandamus action below was being considered on a petition for rehearing, and during which the court had issued a stay of its original order, the effect of such stay being to deny Mr. Kunstler the right to represent respond-

ent, Mr. Kunstler nevertheless attempted to initiate a habeas corpus action on behalf of respondent. That suit was assigned to the Hon. S. Hugh Dillin, another judge of the United States District Court for the Southern District of Indiana. Judge Dillin noted that the petition was not signed by respondent but only by Mr. Kunstler. Judge Dillin, noting other defects in the petition and being apprised of the pending proceedings in the Court of Appeals, concluded that the petition was nothing more than a sham proceeding by Mr. Kunstler to get the district court to recognize him as counsel for the respondent. See opinion attached as Exhibit D to Petition For Writ of Certiorari. Then on October 6, 1973, after Mr. Justice Rehnquist had granted a stay of the Court of Appeals' decision, the effect of such stay again being to deny Mr. Kunstler the right to represent respondent, Mr. Kunstler filed another mandamus action, this time against Judge Dillin. True to form Mr. Kunstler then called a press conference before an Indianapolis radio station during which he made the following statements:

> "'• • • I think it's a frightful thing that has been done to him [Banks] by the Government of the United States, the American Bar Association, 21 of the so-called prestigious Indiana lawyers who filed against him, and a United States district judge by the name of Dillin, who is being sought to be impeached because of his integration decree in Indiana and while I'd oppose his impeachment on those grounds, I would wholeheartedly support it for what he has done to this black man in Terre Haute. He has violated his oath of office and he has denied this man the most fundamental of rights. He has ignored his habeas corpus. He has succeeded in stalling his case long enough for the Government to catch up with Justice Rehnquist in Washington and to put his case in limbo where it cannot move. And those who say to American citizens, trust in the system and do not adopt alternative methods, may some day

remember this case along with others when people refuse to trust the system. It's about the worst instance in my career of some 25 years that I have ever seen. Judge Hoffman pales into insignificance when you compare him to Judge Dillin, because Judge Hoffman was at least honest. Judge Dillin is a fraud. And, I think he has done a [sic] enormous injustice to Arthur Banks and he probably has done it because he is trying to avoid the anger of the citizens of Indiana for his integration decree and so he has decided to destroy Arthur Banks in order to get back on the establishment's bandwagon. It's a very sad and desperate thing, I think, that a Federal judge will violate his oath of office in this fashion, but I gess [sic] it's not unexpected since the President of the United States does it regularly.

" 'Well, in this case, it's an alliance between the United States government, the American Bar Association, the Indiana Bar or what they call prestigious members of the Indiana Bar and the Federal Judges in this District, Judge Holder, Judge Dillin and others. And it's a vicious cycle, one feeds into the other. It's a criminal conspiracy to subvert the Constitution. And these men like Dillin and Holder are criminals and it's just too bad that American people don't recognize who the real criminals are in their midst. They are not in Terre Haute prison. They sit in White Houses and State Houses and they sit on benches and they destroy human beings. And I don't know what should be done to them. I have several ideas.' " (Exhibit B to Answer of Hon. S. Hugh Dillin)

Thereafter the Court of Appeals denied the application for mandamus against Judge Dillin.

SUMMARY OF ARGUMENT

Leave to unadmitted counsel to appear pro hac vice in a criminal proceeding may be denied where that counsel is responsible for unreasonable delays in the proceedings and where that counsel violates and expresses an inten-

tion to continue to violate court rules and ethical standards proscribing extra judicial statements that have the reasonable likelihood of prejudicing the rights of the defendant or the government to a fair trial and the public's interest in the orderly administration of justice. Such rules of court and ethical standards are compatible with the first amendment.

I. THE SIXTH AMENDMENT DOES NOT IMPAIR THE AUTHORITY OF A TRIAL COURT TO DENY LEAVE TO UNADMITTED COUNSEL TO APPEAR *PRO HAC VICE* BECAUSE OF CONDUCT CONTRARY TO THE COURT'S RULES AND THE ETHICAL STANDARDS OF THE PROFESSION.

The Sixth Amendment declares that an accused enjoys the right "to have the assistance of counsel for his defense." However, this right is not absolute. "The constitutional mandate is satisfied so long as the accused is afforded a fair or reasonable opportunity to obtain particular counsel, and so long as there is no *arbitrary* action prohibiting the effective use of such counsel. *The conclusion becomes inescapable, therefore, that although the right to counsel is absolute, there is no absolute right to a particular counsel." United States ex rel. Carey* v. *Rundle,* 409 F.2d 1210, 1215 (3rd Cir. 1969), *cert. denied,* 397 U.S. 946 (1970). (Emphasis supplied.)

Since the right to counsel means the right to be represented by a member of the bar, it does not extend to persons not admitted to practice or who have been excluded from practice permanently or temporarily. Thus the Sixth Amendment does not give an accused the right to select an attorney previously admitted in the jurisdiction whose right to practice has been suspended for unethical conduct, and this would apply to exclusion for misconduct in the particular case as well as to a general suspension.

It has long been the general practice of courts to allow foreign counsel to appear *pro hac vice.*

That is far from saying, however, that a defendant has a constitutional right to be represented by foreign counsel. "It is well settled that permission to a nonresident attorney, who has not been admitted to practice in a court, to appear *pro hac vice* in a case there pending is not a right but a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge." *Thomas* v. *Cassidy*, 249 F.2d 91, 92 (4th Cir. 1957), *cert. denied sub nom., Fitzgerald* v. *Cassidy*, 355 U.S. 958 (1958), in which the nonresident lawyer engaged in unspecified "unlawyerlike" conduct. See also *People of the State of New York* v. *Epton*, 248 F.Supp. 276, 277 (S.D. N.Y. 1965); *In re Henry*, 40 N.Y. 560 (1869); *Manning* v. *Roanoke & T. R. Co.*, 122 N.C. 824, 28 S.E. 963 (1898); *Youmans* v. *Hanna*, 35 N.D. 479, 160 N.W. 705 (1916); *In re Pierce*, 189 Wis. 441, 207 N.W. 966 (1926).

Nevertheless, the exercise of discretion must be reasonable and not arbitrary. As a practical matter, since it is desirable to allow a defendant to be represented by an attorney of his choice, this means that a defendant's request to be represented by outside counsel, in association with local counsel, will be granted unless good cause for denial appears.

However, the question of whether a defendant has a right to a lawyer not a member of the local bar has seldom been presented in constitutional terms. Indeed, the powers of state and federal courts to require that attorneys practicing before them be admitted to their bars would be greatly impaired, both in principle and practice, if parties had a constitutional right to be represented by any attorney admitted anywhere.

The Third Circuit, speaking through Circuit Judge Goodrich, in *Cooper* v. *Hutchinson,* 184 F.2d 119, 122 (3rd Cir. 1950), found such a proposition "startling", and observed (p. 122):

> "The argument for the appellants thus necessarily goes far beyond an insistence that a man charged with a capital crime in a state court must have the assistance of counsel. These appellants have had the service of counsel all the way through the prosecution of the charges against them. The narrower question here is the extent to which an accused person's choice of counsel is a constitutional right. The argument insists that there is a constitutional right, at least in a capital case, to whatever counsel an accused person pleases to have. If that counsel is not a member of the bar of the state where the prosecution is being conducted, still, the argument runs, the accused may effectively choose him just as freely as he could choose a lawyer admitted to practice locally. The person chosen by the accused may then insist upon conducting the defense in the local courts. Control by the states over the persons who may be licensed to practice law in their courts would thus be greatly diminished in every capital criminal prosecution where the accused desires counsel from somewhere else.
>
> "The length to which this argument takes one is startling. It has always been thought that the license to practice law is limited, except as a matter of grace, to persons who had fulfilled the local requirements for practice. The Civil Rights Act provision relied upon here is a powerful piece of legislation and its power has ben recognized by this Court. But we have never been asked to take it this far. The Bergamo case, which has been pressed upon us, is not conclusive here, for in that case we were only laying down qualifications for the trial of cases in the federal courts of this circuit."

Since outside counsel had been already admitted *pro hac vice* in the *Cooper* case, the Court found it necessary to

hold only that a right thus granted, "may not, without cause, be taken away", without passing upon the "broad question" of the right of outside counsel to appear in the first instance.*

The argument that a criminal defendant has a constitutional right to an out of state attorney was recently rejected by the New Jersey Supreme Court in *State* v. *Kavanaugh*, 52 N.J. 7, 243 A.2d 225, 231 (1968), *cert. denied, sub nom., Matzner* v. *New Jersey*, 393 U.S. 924 (1968), with the Third Circuit concurring:**

> "Mr. Bailey's clients urge a constitutional right to select an attorney who is not a member of our Bar. So long as the Bar of our State is able, willing and free to provide effective counsel, there is no such right. Thomas v. Cassidy, 249 F.2d 91 (4 Cir. 1957), certiorari denied, Fitzgerald v. Cassidy, 355 U.S. 958, 78 S.Ct. 544, 2 L.Ed2d 533 (1958); People of State of New York v. Epton, 248 F.Supp. 276 (S.D. N.Y. 1965); see Parker v. Parker, 97 So.2d 136 (Dist. Ct. App. Fla. 1957); Johnson v. DiGiovanni, 347 Mich. 118, 78 N.W.2d 560, 565 (Sup. Ct. 1956). This is not a situation in which no member of the local Bar will act. See Lefton v. City of Hattiesburg, Mississippi, 333 F.2d 280 (5 Cir. 1964). There is no dearth of competent attorneys in our State ready to meet the constitutional right to counsel. There is nothing provincial about the requirement for admis-

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* *In United States* v. *Bergamo*, 154 F.2d 31, 35 (3rd Cir., 1946), where there was no suggestion of improper conduct on the part of the attorneys selected by the defendants, the same Circuit had said "To hold that defendants in a criminal trial may not be defended by out-of-the-district counsel selected by them is to vitiate the guarantees of the Sixth Amendment." The constitutional basis for this dictum was repudiated in the *Cooper* opinion quoted in the text, written by Circuit Judge Goodrich who had been a member of the panel in *Bergamo*.

** The United States District Court refused to overturn the decision of the New Jersey Supreme Court saying that it could "add nothing" to that court's "comprehensive and well reasoned decision." *Matzner* v. *Brown*, 288 F.Supp. 612 (D. N.J.), aff'd, 410 F.2d 1376 (3rd Cir., 1969), cert. denied, 296 U.S. 1015 (1970).

sion to practice in the courts of a State. The courts of every jurisdiction must have control of practice before them as an 'incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct insullied.' Cohen v. Hurley, 366 U.S. 117, 123-124, 81 S.Ct. 954, 958, 6 L.Ed.2d 156, 162 (1961)."

Occasional statements that a defendant's right "to be heard through his own counsel was unqualified" (*Chandler* v. *Fretag*, 348 U.S. 3, 9 (1954)) and that the right to counsel of one's own choice is "absolute and no showing of special circumstances is necessary" (*Reickhauer* v. *Cunningham*, 299 F.2d 170, 172 (4th Cir. 1962)) were made in cases in which defendant was allowed no effective legal representation and which did not in any way involve a question of non-local counsel or the failure of selected counsel to comply with court rules or ethical standards. And there are cases, such as *Bergamo* and *Magee* v. *Superior Court*, 8 Cal.3d 949, 106 Cal. Rptr. 647, 506 P.2d 1023 (1973), holding that leave to appear *pro hac vice* may not be denied without good reason; neither case involved any charge of unethical conduct.*

As the *Kavanaugh* and *Rundle* cases (all *supra*) show, at least two factors have been recognized as good cause for denying retained counsel, both in and out of state, leave to appear. One is the inability of such counsel to serve without unduly delaying the trial. "Desirable as it is that a defendant obtain private counsel of his own choice, that goal must be weighed and balanced against an equally desirable public need for the efficient and effec-

* In the *Magee* opinion the California court stated that the defendant's choice of retained counsel "can constitutionally be forced to yield only when it will result in significant prejudice to the defendant himself or in a *disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.*" 506 P.2d at 1025 (Emphasis supplied.).

tive administration of criminal justice." *United States ex re. Carey* v. *Rundle,* 409 F.2d 1210, 1214 (3rd Cir. 1969); *United States V. Hampton,* 457 F.2d 299, 301 (7th Cir.), *cert. denied,* 409 U.S. 856 (1972); *United States* v. *Cozzi,* 354 F.2d 637, 639 (7th Cir.), *cert. denied,* 383 U.S. 911 (1966); *United States* v. *DiStephano,* 464 F.2d 845, 846 n. 1 (2d Cir., 1972); *United States* v. *Pigford,* 461 F.2d 648 (4th Cir. 1972).

In the present case, Mr. Kunstler was not present at the first arraignment on December 14, 1972, although respondent represented to the court that Mr. Kunstler had been retained approximately one month previously. Nor was Mr. Kunstler present at the second arraignment on January 2, 1973, nor at the third arraignment on February 2, 1973. Contrary to respondent's statement that Mr. Kunstler had been retained in November, 1972, Mr. Kunstler states that he first became counsel for respondent on February 9, 1973. Although Mr. Kunstler was in Terre Haute on that date, during which he made a public speech concerning the respondent, Mr. Kunstler did not then file an application for leave to appear for respondent, but waited until March 21, 1973. When petitioner, who was near completing the session of court in the Terre Haute Division,* attempted to schedule Mr. Kunstler's motion for hearing, Mr. Kunstler represented to petitioner's clerk and staff that he was unavail-

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* Pursuant to 28 U.S.C. §§ 139-141, the United States District Court for the Southern District of Indiana has adopted a rule providing:

> "A trial session of this Court shall be commenced at the United States Courthouse, Terre Haute, Indiana, in the Terre Haute Division of this district on the 3d Monday of September, the 3d Monday of January, and the 3d Monday of May in each year."

The Court also by general order has provided:

> "Alternately and in rotation, each judge other than the chief judge, shall preside over the regular sessions of court to be held in the Terre Haute, Evansville, and New Albany divisions. Such sessions shall be held as designated herein.
>
> "Each judge presiding in these divisions shall have the authority to deal with all pending cases during the session of court in the same manner as though the cases were assigned to him. Upon the adjourn-

able at the scheduled time and had many other more important matters to attend to. Petitioner finally scheduled the hearing for April 1, 1973, a Sunday which was the first date Mr. Kunstler indicated his availability and was after petitioner had concluded all other matters on the calendar for that session of court in Terre Haute. Petitioner found, and it is submitted appropriately so on the basis of the foregoing authorities, that the delays attributable to Mr. Kunstler was sufficient reason to deny his motion for leave to appear. At a minimum such delays alone called for serious assessment, but they were only one facet of Mr. Kunstler's conduct that led to petitioner's conclusion to deny the motion for leave to appear.

The second factor recognized as good cause for denying retained counsel is whether the outside lawyer has engaged in "unlawyerlike," unethical or illegal conduct in relation to the particular case. So far as petitioner has been able to ascertain, *every* court which has mentioned lawyers' misbehavior, whether by way of holding or dictum—and fortunately there are few such cases—has indicated that it is a legitimate ground for excluding an outside attorney from a case. Holdings: *Thomas* v. *Cassidy*, *State* v. *Kavanaugh*, *Matzner* v. *Brown*, all *supra*; *Parker* v. *Parker*, 97 So.2d 136 (Fla. Ct. App. 1957). Dicta: *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968); *Spanos* v. *Skouras Theatres Corp.*, 364 F.2d 161, 168 (2d Cir. en banc, 1966), *cert. denied*, 385 U.S. 987 (1966); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Jackson*, 235 F.2d 390, 393 (10th Cir. 1956).

Petitioner submits there is no better reason to deny a lawyer leave to appear *pro hac vice* than his refusal to abide by the rules of the court and the ethical standards

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ment of court in the above-named divisions, any case remaining on the trial calendar over which a judge assumed jurisdiction for the session shall automatically revert back to the docket of the judge to whom the case was originally assigned. • • •"

of the legal profession, which in this case coincide. Particularly must this be true when the rules and standards in question are designed to insure a fair trial and when the subsequent statements and acts of the lawyer manifest an intention to continue to engage in the same kind of conduct. Indeed, unless the Rule, the Code and the canons are unconstitutional, this would seem to be the most compelling reason for not allowing outside counsel to appear.

In *Kavanaugh,* which also involved public statements by out-of-state counsel, the Supreme Court of New Jersey recently ordered F. Lee Bailey removed as counsel (243 A.2d at 231):

> "It is not easy for us to oust counsel of a client's choice. But the misbehavior here is so gross that we cannot risk more of it. We have searched for some evidence that Mr. Bailey would stay in bounds, but unhappily we cannot find it. There must be a fair trial, *both for a defendant and for the State.* The conduct here involved invaded that interest. But of even greater moment than the interest of the immediate parties is the interest of the public in the integrity of the judicial process. The antics here involved spill over upon the right of all litigants to expect justice in the courtroom and in accordance with the rules of law. We have weighed again and again whether that larger interest could be served by a subsequent disciplinary proceeding alone, and we are constrained to find that it would not. We must therefore affirm the order." (Emphasis supplied.)

Kavanaugh and its campanion case in the federal courts (*Matzner* v. *Brown supra,* p. 16) were cases in which "a defense counsel's course of conduct involving pretrial publicity has been held to override the defendant's Sixth Amendment right to counsel of his own choosing." Compare the Court of Appeals order of May 17, 1973, Exhibit A to the Petition For Writ Of Certiorari.

Standard 3.5 of the ABA Project on Standards for Criminal Justice, *Standards Relating to the Function of the*

Trial Judge 1972 (pp. 45-46)* recognizes both that a defendant's request to be represented by an outside attorney should be given "great deference" and that permission may be denied an attorney who misbehaves:

> "3.5 Attorneys from other jurisdictions.
>
> "If an attorney who is not admitted to practice in the jurisdiction of the court petitions for permission to represent a defendant, the trial judge may
>
> "(a) deny such permission if the attorney has been held in contempt of court or otherwise formally disciplined for courtroom misconduct, or if it appears by reliable evidence that he has engaged in courtroom misconduct sufficient to warrant disciplinary action;"

Although subparagraph (a) specifically refers only to "courtroom misconduct", the Committee's Commentary makes it clear that this enumeration only "sets forth some grounds (by no means exclusive) upon which a judge might justifiably decline to permit counsel to be specially admitted." The Commentary states (p. 46):

> "Great deference should be given to the request of a defendant to be represented by counsel of his choice. Yet there is no absolute right to be represented by counsel who is not admitted to practice in the jurisdiction of the court. Subparagraph (a) sets forth *some grounds (by no means exclusive) upon which a judge might justifiably decline to permit counsel to be specially admitted;* and subparagraph (b) suggests some conditions which might be imposed, with the objective of minimizing the risk that a trial may be aborted by misconduct of counsel. *No rigid rules are appropriate, however, and each application should be considered on its own circumstances.* The trial judge should apply the law of the forum in determining whether this misconduct brought to his attention would warrant disciplinary action." (Empasis supplied.)

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* These standards were recommended by the Advisory Committee on the Judge's Function and approved by the ABA House of Delegates in August, 1972.

A trial judge may properly regard out-of-court misconduct likely to interfere with a fair trial as grounds for denying leave to appear specially.

Of course, refusal to comply with the rules of court and ethical standards is also good cause for denying admission to the bar in the first instance, and for suspension or disbarment once an attorney has been admitted. The right of an accused who wishes to be represented by a lawyer not admitted to the local bar can be no greater than that of a defendant with local counsel. Since special permission to appear must be granted in such cases, the Court must have at least as broad an authority to deny leave as would a court to which the attorney was admitted; indeed, the discretionary character of the application for leave suggests that the authority in dealing with such applications should be broader.

One reason is the lesser ability of a court to discipline or control attorneys not members of its bar. Some attorneys may feel less impelled to act respectfully or otherwise comply with ethical standards in courts in which they do not have to continue to practice. Compare *State* v. *Kavanaugh*, *supra*. Another reason is that disbarment or suspension is a much more drastic sanction than exclusion from a single case in a court in which the attorney does not generally practice.

Neither the Sixth Amendment nor any other principle of law guarantees a defendant the right to be represented by counsel not admitted to the local bar who has violated and threatens to violate the ethical standards embodied in the Court's rules and the Code of Professional Responsibility.

The critical issue remains as to whether the rules of ethical considerations which condemn Mr. Kunstler's conduct are incompatible with the First Amendment.

II. THE ETHICAL STANDARDS HERE IN ISSUE ARE COMPATIBLE WITH THE FIRST AMENDMENT.

A. The Rules Against Pretrial Publicity by Counsel in a Criminal Case.

Mr. Kunstler contends that the portions of Rule 27 and DR 7-107 of the Code of Professional Responsibility here involved are "facially unconstitutional." See "Response to Undated Entry" (p. 6) filed in the Court of Appeals April 11, 1973, and "Brief In Opposition to Petition for Certiorari" (pp. 14, 16) filed in this Court on December 27, 1973.

It may be assumed that the First Amendment would preclude a prohibition against similar statements by the press or other persons not counsel for parties to the litigation. The test would then be whether there was "a serious and imminent threat to the administration of justice." *Craig* v. *Harney,* 331 U.S. 367, 373 (1947); *Bridges* v. *California,* 314 U.S. 252, 263 (1941); *Pennekamp* v. *Florida,* 328 U.S. 331 (1946); *Wood* v. *Georgia,* 370 U.S. 375, 384-385 (1962). Those cases impose a heavy burden which the prohibitor of such statements must satisfy. "The substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges, supra,* at 263, quoted in *Wood,* at 384. "To warrant a sanction '[t]he fires which [the expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *Craig* v. *Harney,* at 376, quoted in *Wood* at 385.

This test, petitioner submits, is not applicable to statements by lawyers in relation to pending litigation. The ethical standards of the profession, embodied for many years in the Canons of Professional Ethics and now in the

Code of Professional Responsibility, have long disapproved of public statements by trial counsel which might influence the outcome of a trial. The philosophy underlying this limitation is well stated in EC 7-33 of the present Code, *supra*, p. 4.

Former Canon 20 was designed to deal with the problem. It provided:

> "20. *Newspaper Discussion of Pending Litigation*
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> "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement."

In 1964 the Supreme Court of New Jersey relied on this Canon as prohibiting "statements to news media by prosecuting attorneys" which had "the capacity to interfere with a fair trial." *State* v. *Van Duyne*, 43 N.J. 368, 204 A.2d 841, 852, 11 A.L.R.3d 1086, 1102 (1964). The same ban, the New Jersey Supreme Court continued (204 A.2d at 852):

> ". . . applies as well to defense counsel. The right of the State to a fair trial cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence. The courtroom is the place to settle the issue and comments before or during the trial which have the capacity to influence potential or actual jurors to the possible prejudice of the State are impermissible."

In *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), this Court faced up to the difficulties in reconciling the constitutional guarantees of a fair trial and a free press. The Court

there reversed Dr. Sheppard's conviction for murder on the ground that "prejudicial news items [traceable] to the prosecution, as well as the defense" (p. 361) deprived the defendant of a fair trial. The Court went further, however, to suggest means whereby the courts could lawfully adopt "remedial measures that will prevent the prejudice at its inception" (p. 363). In strong, indeed mandatory language, this Court declared (p. 363):

> ". . . The courts *must* take such steps by *rule and regulation* that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. *Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is high censurable and worthy of disciplinary measures.*" (Emphasis supplied.)

With respect to extrajudicial disclosures by counsel, the Court was quite explicit, in language from which Rule 27 and DR 7-107 were plainly drawn. The Court said, citing the *Van Duyne* decision of the New Jersey Supreme Court and former Canon 20 (p. 361):

> "More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie deterctor tests; any statement made by Sheppard to officials; the *identity of prospective witnesses or their probable tetimony; any belief in guilt or innocence; or like statements concerning the merits of the case.* See *State* v. *Van Duyne*, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements. . . ." (Emphasis supplied.)

Subparagraphs (5) and (6) of DR 7-107(B) and (4) and (6) of the third paragraph of Rule 27, *supra*, pp. 2, 3, 4, 5, the provisions most directly involved here, were obviously derived from the emphasized references in the above passage.

The impact of these pronouncements in the *Sheppard* case is described in the Report of the Kaufman Committee of the Judicial Conference on the *Operation of the Jury System on the "Free Press-Fair Trial" Issue*, published in 45 F.R.D. 391 (1969).

> "It was in Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507 (1966), that the Supreme Court laid down a mandate to the courts to deal with the problems caused by the impact of publicity on the jury system. . . . (p. 395.)
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> • • •
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> "The adjuration of Sheppard v. Maxwell has given impetus to one of the most searching debates in recent legal history as to methods of solving the problems of fair trial and free press. In December 1966, the American Bar Association's Advisory Committee on Fair Trial and Free Press under the Chairmanship of Justice Paul C. Reardon of the Massachusetts Supreme Judicial Court released a tentative draft of its report. This report, the product of more than 20 months of study and labor by the Committee and its Reporter, Professor David L. Shapiro of the Harvard Law School, contains specific recommendations on how the impact of publicity on the administration of criminal justice can be controlled. . . ." (p. 397.)

The Reardon Committee's proposal was approved by the American Bar Association in 1968, and subsequently incorporated in DR 7-107 of the Code of Professional Responsibility, approved by the American Bar Association in 1970.

The Kaufman report was the work of a committee of the Judicial Conference of the United States headed by Cir-

cuit Judge Kaufman of the Second Circuit and a subcommittee chaired by District Judge Gignoux of Maine.* The report stated (45 F.R.D. at 407);

> "The Committee is recommending the adoption in substance of the proposed Canon as it appears in Section 1.1 of the Proposed Final Draft of the Reardon Report. In the interest of establishing a uniform standard of conduct for attorneys in criminal cases in both the state and the federal courts throughout the country, the Committee feels that there is merit in adopting in substance the formulation proposed to be included in the American Bar Association's Code of Professional Responsibility.
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> • • •
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> "The Committee recommends action in three major areas. First, it feels that each United States District Court has the power and the duty to control the release of prejudicial information by attorneys who are members of the bar of that court, and it recommends action by local rule to restrict the release of such information on penalty of disciplinary action. (p. 401.)
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> ". . . At its February 1968 session, the Judicial Conference of the United States agreed to accept this report for study, and to that end *directed that it be circulated to all Federal judges with a request that their comments and suggestions be communicated to the Committee no later than July 1, 1968.* The *individual and collective opinions* of federal judges reported to the July 18th meeting of the Committee *overwhelmingly reflected general satisfaction* with all recommendations of the report. . . ." (p. 400.) (Emphasis supplied.)

"The Kaufman Committee Report was subsequently adopted by the Judicial Conference of the United States and implemented by Local 'Free-Press—Fair Trial' Rules

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* The committee was composed of three circuit judges and nine district judges.

promulgated by each District Court." *United States* v. *Dickinson*, 465 F.2d 496, 505 (5th Cir. 1972).

The Dickinson opinion continued:

> "• • • The Report and the Local Rules embodying it, however, must be viewed in light of the historically delicate balance the recommendations sought so zealously to preserve. Painstakingly harmonizing history with contemporary realities, freedom of the press with fundamental fairness of trials, the Kaufman Committee explored every aspect of the problem and its Report synthesizes all relevant considerations. The result is a catalogue of explicit proposals, *most taken directly from the Sheppard opinion*, inventorying the tools available to the trial Judge in discharging his affirmative duty to protect the accused from prejudicial publicity and disruptive influences at trial, but carefully avoiding any but the most limited, tangential and indispensable controls on the press." (Emphasis supplied.)

No subsequent opinion of this Court in any way impairs the authority of the portion of the *Sheppard* opinion from which the rule was taken. In these circumstances, Mr. Kunstler's argument that the Rule and Code are "facially unconstitutional" is, to say the least, unpersuasive.

That such restrictions on the conduct of the litigating lawyer would be constitutional was foreshadowed in *In re Sawyer*, 360 U.S. 622 (1959), in which this Court was confronted with a problem similar in many respects to that presented here. While a trial charging conspiracy in violation of the Smith Act was going on, one of trial counsel made a public speech which the Supreme Court of Hawaii and the Ninth Circuit construed as an attack upon the integrity of the federal district judge and his fairness and impartiality in trying the case. The Hawaiian Supreme Court suspended the lawyer from practice for one year. Although five justices of this Court, including Mr. Justice Stewart in a concurring opinion, voted to reverse on the

ground that the attorney was at most "voicing strong criticism of Smith Act cases and the Government's manner of proving them," the four dissenters and Mr. Justice Stewart expressed the view that the attorney could have been disciplined if her remarks had violated the standards of the profession, as Justices Frankfurter, Clark, Harlan and Whittaker (but not Stewart) thought they had.

Mr. Justice Frankfurter's opinion, which on the constitutional question represented the views of a majority of the Court, stated (360 U.S. at 668):

> ". . . Here was a public meeting addressed by counsel for the defense, haranguing a crowd on the unfairness to the defendant of the proceedings in court, *with the high probability indeed almost certainty under modern conditions that the goings-on of the meeting would come to the attention of the presiding judge and the jury.* It took place in a case in which public interest and public tempers had been aroused. When the story of the meeting came to the attention of the judge, he felt obliged publicly to defend his conduct. *It is hard to believe that this Court should hold that a member of the legal profession is constitutionally entitled to remove his case from the court in which he is an officer to the public and press,* and express to them his grievances against the conduct of the trial and the judge. *'Legal trials,' said this Court, 'are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.' Bridges v. California,* 314 U.S. 252, 271.
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> "*Even in the absence of the substantial likelihood that what was said at a public gathering would reach the judge or jury, conduct of the kind found here cannot be deemed to be protected by the Constitution.* An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense. He does not lack for a forum in which to make his charges of unfairness or failure to adhere to principles of law; he

has ample chance to make such claims to the courts in which he litigates. As long as any tribunal bred in the fundamentals of our legal tradition, ultimately this Court, still exercises judicial power those claims will be heard and heeded." (Emphasis supplied.)

Mr. Justice Stewart faced up to the problem whether the litigating lawyer was bound by the ethical standards of the profession. He stated:

"If, as suggested by my Brother Frankfurter, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from evenhanded discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.

"*Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.* * * *

"In the present case, if it had been charged or if it had been found that the petitioner attempted to obstruct or prejudice the due administration of justice by interfering with a fair trial, this would be the kind of a case to which the language of the dissenting opinion seems largely directed. * * *" (Emphasis supplied.)

The *Sawyer* case parallels this case in two respects. In the first place, the litigating lawyer there as here sought to try his case "through the use of the meeting-hall, the radio, and the newspaper", with a high probability that what was said "would come to the attention of the presiding judge and jury." Secondly, the *Sawyer* case was concerned with a public challenge to the trial judge's integrity and impartiality.

Compare Kunstler's initial attack on petitioner: ". . . he is doing it for no good reason whatsoever, other than his

own innate prejudice against me. . . . It was done in a cold and crass and criminal manner by a judge who in doing so committed a crime. He violated the civil rights of a defendant . . . he should be indicted . . . he violated his oath of office . . . he violated every tenet of human decency. . . ." Later concerning the related habeas corpus proceeding before Judge Dillin Mr. Kunstler stated "He violated his oath of office. . . . Judge Hoffman pales into insignificance when you compare him to Judge Dillin, because Judge Hoffman was at least honest. Judge Dillin is a fraud . . . he probably has done it because he is trying to avoid the anger of the citizens of Indiana for his integration decree and so he has decided to destroy Arthur Banks in order to get back on the establishment's bandwagon. . . . It's a criminal conspiracy to subvert the Constitution. And these men like Dillin and Holder are criminals and it's too bad that American people don't recognize who the real criminals are in their midst. They are not in Terre Haute prison . . . they sit on benches and destroy human beings." See pp. 9, 10, 11 *supra*.

As to both points Mr. Justice Frankfurter's opinion states that such behavior by trial counsel is not protected by the First Amendment, and Mr. Justice Stewart indicated agreement on the law though not as to the interpretation of the substance of the lawyer's remarks in that case.

Thus the opinions of Justices Stewart and Frankfurter together indicated that the majority of this Court was of the view that the First Amendment did not preclude the temporary disbarment of trial counsel for statements which might affect the fairness of a pending case. Since the instant case concerned only the discretionary authority to grant leave to appear *pro hac vice*, the District Court's action did not go that far.

The Court of Appeals below relies on *Chase* v. *Robson*, 435 F.2d 1059 (9th Cir. 1970). The scope of the prohibitions

involved in the *Chase* case may have warranted application there of the broad First Amendment standard of "clear and present danger" or "serious or imminent threat to the administration of justice". But to read that case more broadly as governing cases like this, would make it inconsistent with the authorities discussed earlier in this brief, the *Sawyer* and *Sheppard* cases in particular, which demonstrate that the test is different for counsel actually participating in a criminal case. These authorities establish that specific prohibitions such as those contained in DR 7-107 and Rule 27 may be generally enforced without further showing of a likelihood that their violation in each individual case will seriously prejudice the administration of justice. Indeed, the suggestion in *Sheppard* (384 U.S. at 363, *supra*, p. 30) that "courts must take steps by rule and regulation" means that a general rule governing the conduct of counsel was both called for and constitutional.

The Court of Appeals in *Chase* referred to "the lesser standard" of reasonable likelihood of a "serious and imminent threat to the administration of justice". The phrase "reasonable likelihood" appears both in *United States* v. *Tijerina*, 412 F.2d 661, 663 n. 1, 666 (10th Cir. 1969), and in the introductory paragraph to the Reardon and Kaufman committee proposals embodied in District Court Rule 27.

In the *Tijerina* case the Tenth Circuit rejected the contention that a clear and present danger test governs the application of an order prohibiting outside publicity in a particular case, saying (412 F.2d at 666):

> "Counsel attack the order on the ground that it is not based on a clear and present danger. The order is based on a 'reasonable likelihood' of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. We believe that reasonable likelihood suffices. The Supreme Court

has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial."

The Court then pointed out that in *Sheppard* the Supreme Court "established guidelines necessary to assure a fair trial in a case which attracted wide publicity" (p. 667), and concluded:

> "The ultimate question is whether the application to the defendants of an order against extrajudicial statements violates their rights of freedom of speech. The defense argument necessarily places freedom of speech in a preferred position above fair trial. . . . This preferred position has never been approved in a case where a balance must be had between free speech and fair trial. Indeed, the Court has awarded the preference to fair trial. . . .
>
> "The order against extrajudicial statements was designed to maintain the atmosphere essential to the preservation of a fair trial, 'the most fundamental of all freedoms.' . . ."

Just recently on February 5, 1974 the U.S. District Court for the Northern District of Illinois in a joint opinion rendered by five of the senior judges sustained the rules and ethical standards involved in this case against a constitutional challenge. *Chicago Council of Lawyers, et al.* v. *William J. Bauer,* 70C2194 (Opinion attached as Exhibit A). In reaching its conclusion, that court held that the lawyer statements which the rules and standards proscribed were to be assessed in terms of whether the statements presented a "reasonable likelihood" of prejudice to any party or the public's interest in the administration of justice, not the more stringent standard of "clear and present danger", or "serious and imminent threat" which may apply to persons other than lawyers involved in a pending case. The court below, although it previously recognized the lesser standard of "reasonable likelihood" in *Chase,* aban-

doned it in the decision sought to be reviewed. It adopted the test of "serious and imminent threat". Petitioner submits the court in doing so erred.

The text of Rule 27 (which is the rule recommended by the Judicial Conference and the Kaufman committee) demonstrates that the prohibitions upon the public dissemination by trial counsel of statements with respect to the enumerated subjects was not to be watered down by requiring proof of more than the fact that these specific prohibitions had been disregarded.

Rule 27 enumerates the specific restrictions on counsel after arrest or the filing of a complaint, information or indictment. With respect to the six specific subparagraphs, the Kaufman report describes the Reardon committee recommendation (which it adopted) as contemplating (45 F.R.D. at 407):

> ". . . *an absolute prohibition* of extrajudicial disclosure by attorneys of prior criminal records, confessions, tests, witnesses, opinions as to the guilt or innocence of the accused, the merits of the case or the evidence involved, as well as other described matters potentially prejudicial in nature." (Emphasis supplied.)

Thus clearly it was not contemplated that further evidence would be necessary in every case to show that the prohibited disclosures were reasonably likely to interfere with a fair trial or the administration of justice. On the contrary, the whole purport of the recommendations and the Rule was that there would be a reasonable likelihood of such an interference whenever the types of statements specifically prohibitd occurred while the criminal case was pending, and that therefore a general prohibitory rule—"an absolute prohibition"—was justified.

As a practical matter, of course, seldom can it be proved at the time of such extrajudicial comments that they clearly

or seriously or imminently will make it more difficult to impanel an impartial jury or otherwise will prevent a fair trial. But in any community the public dissemination of such statements is reasonably likely to have such an effect. This Court has recognized that a threat to fair trial may be inherent in a certain procedure or conduct although it may be difficult or impossible to prove specific isolatable prejudice. *Cf. Estes* v. *Texas,* 381 U.S. 532, 85 S.Ct. 1628 (1965). In that case the court was concerned with the effect of televising a trial, but its broad concern was that

> "• • • the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs. Our approach has been through rules, contempt proceedings and reversal of convictions obtained under unfair conditions. Here the remedy is clear and certain of application. • • •" (p. 1632)

Some of the concerns of the court in that case are applicable here, viz., the elevation of an ordinary case to a *cause celebre* and the accompanying impact on jurors and witnesses, and additional burdens imposed on the presiding judge. The court concluded that an absolute prohibition of television was necessary to prevent prejudice.

Thus, it is submitted that in the present type situation, a binding rule is necessary to insure that trials will be fair. Furthermore, counsel who wish to abide by the standards of the profession are entitled to definite guidelines. Few lawyers would welcome the problem of having to decide, at the risk of disciplinary proceedings, whether something they say would be "reasonably likely" to interfere with a fair trial or the administration of justice. The inadequacy of such an indefinite standard was one of the reasons why the vague provisions of former Canon 20 were ineffective and seldom enforced. Kaufman report, 45 F.R.D. at 406.

It is submitted therefore that the criteria which govern

the protection of First Amendment freedoms in other circumstances—the need for proof of "a serious or imminent threat" or "a clear and present danger" in a particular case—is not an appropriate guide to determining the propriety of public statements by trial counsel during the pendency of litigation. It must be sufficient, if the objects of the constitutional provisions which seek to guarantee impartial justice are to be achieved, that the rules governing attorneys' conduct prohibit the types of statements which are generally reasonably likely to interfere with the fairness of trial.

The majority of the Supreme Court in *Sawyer* and *Sheppard* obviously did not believe that the *Bridges-Pennekamp-Craig* doctrine was applicable in such circumstances. Accordingly, the invocation of the doctrine of the later cases in the Court of Appeals' decision in *Chase,* while perhaps not inappropriate for the facts presented in that case, should not be extended so as to nullify the specific guidelines to an attorney's conduct embodied in Rule 27 and DR 7-107 of the Code of Professional Responsibility.

B. The Incitations to Demonstrate and Fill the Courtroom.

In the course of the speech and press interview in which he communicated to the public his views as to the credibility of possible witnesses and the merits of his client's case, Mr. Kunstler also urged his listeners to "organize demonstration [sic] in support of Banks," "to fill the courtroom with sympathetic spectators during the trial," "to do everything possible to support the trial" and "anything they can do to call attention to the trial will be welcome. I am not asking them to blow up the courthouse but that would certainly draw attention." "Picket the Courthouse, do anything that will contribute to the issue." His broadcast urged "physical confrontation. . . ." See pp. 7, 9, 10, *supra.* Before the District Court he insisted he had a right under the First Amendment to do this.

The obvious purpose of these remarks was to aid his client by putting pressure on the judge and jury, to influence them through factors entirely extraneous to what would come before them in the ordinary course of an orderly hearing. There is no other way in which Mr. Kunstler could have thought that organizing demonstrations, filling the courtroom, picketing the courthouse or drawing public attention to the trial could have helped him.

Neither the Code of Professional Responsibility nor any Rule of Court in precise words prohibits an attorney from engaging in conduct of this sort—perhaps most lawyers do not have to be told that it would undermine the just functioning of our system of law. DR 1-102(A)(5) and EC 7-36, quoted at p. 4, *supra*, which forbid "conduct prejudicial to the administration of justice," and conduct "that offends the dignity and decorum of proceedings," come the closest. But for counsel to attempt to influence judges and juries by inciting demonstrations or by filling the courtroom more seriously prejudices the fair and lawful administration of justice than mere breaches of dignity or decorum. And this is so even if it be assumed that demonstrators will not be violent, and that the attorney will not deliberately stimulate disorder in the courtroom; a courtroom packed with enthusiasts for one side has an obvious potential for such disorder, as any knowledgeable person would recognize.

The underlying concept of fairness in judicial proceedings is that cases will be decided on the facts in evidence and under the law as understood by the judge, without outside influence. An attempt to bring extraneous factors to bear on judge and jury is thus an effort to subvert the foundation of the judicial process. It may be that judges and juries are not always influenced by all outside considerations. But this does not excuse a litigating lawyer who deliberately incites others to exert or to attempt to exert

outside influence as a tactical device. *Cf. Estes* v. *Texas*, *supra*, p. 35. Such conduct clearly goes beyond permissible means of zealously representing a client.

This would be patently obvious if many lawyers in many cases sought to arouse the public to demonstrate or pack courtrooms in support of their clients. Unless the practice was halted, the fair administration of justice would become impossible. And such tactics do not become more tolerable because exercised in behalf of members of minority groups, or only in cases which lawyers are convinced of their clients' rectitude and fear that the unpopularity of their cases may make it difficult for them to win. These are precisely the situations in which an unpressured tribunal is the most vital. For pressure and influence may be exerted more powerfully by majorities than minorities.

Since the incitations in question would be "prejudicial to the administration of justice" in contravention of DR 1-102(A)(5), the attorney's action is not protected by the First Amendment. The basic reason is the same as for violations of the Code provisions governing pretrial publicity, discussed at pp. 23-36, *supra*—fair trials and due process of law are dependent upon fair and unbiased judges and juries.

The question here is not whether persons generally have a right to attend proceedings in courtrooms, or to demonstrate or organize demonstrations relating to a pending case. Whether they do not may or will depend on the circumstances, and Mr. Kunstler's remarks are not specific as to time or place or content or noisiness or orderliness, except for his specific plea for filling the courtroom with sympathizers. The issue here is whether the Constitution guarantees the litigating attorney the right to try to influence a court in this manner. Mr. Justice Stewart's admonition in *Sawyer* (*supra*, p. 30) that an attorney may be

bound by ethical precepts to abstain from what "might be constitutionally protected speech for others" is equally applicable to such statements as well as to those discussed in Point II A. And so is the teaching of *Sheppard* v. *Maxwell*, that one means of reconciling the fair trial-free press dilemma is to leave the press and other persons free but to adopt rules restricting what the counsel for the parties may communicate to the public while a case is pending. In *Cox* v. *Louisiana* (No. 2), 379 U.S. 559 (1965), this Court upheld a statute making it a crime to picket or parade near a courthouse "with the intent of interfering with . . . the administration of justice or . . . of influencing any judge, juror, witness or court officer." The unspoken premise of the opinion was that the same sort of picketing might have been lawful in other circumstances. The majority opinion of Mr. Justice Goldberg, with no dissent on this point, said (379 U.S. at 562):

> "There can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create. Since we are committed to a government of laws and not of men, it is of the utmost importance that the administration of justice be absolutely fair and orderly. This Court has recognized that the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy. See *Wood* v. *Georgia*, 370 U.S. 375, 383. The constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding, starting with arrest and culminating with a trial 'in a courtroom presided over by a judge.' *Rideau* v. *Louisiana*, 373 U.S. 723, 727. There can be no doubt that they embrace the fundamental conception of a fair trial, and that they exclude influence or domination by either a hostile or friendly mob. There is no room at any stage of judicial proceedings for such intervention; mob law is the very antithesis of due process. See *Frank* v. *Mangum*, 237 U.S. 309, 347 (Holmes, J., dissenting). A State may

adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence."

The *Cox* case differs from this one in that the Court there relied on the specificity of the criminal statute and because picketing and parading were regarded as conduct and not merely speech. But the same passage (p. 463) reviews the cases holding that verbal incitations to wrongful conduct do not have First Amendment protection. Verbaly incitation to exert pressure on a judicial tribunal would seem to fall in the same category. Furthermore, Mr. Kunstler is not being subjected to criminal penalties, but only prevented from trying a case in a court to which he has not been admitted to practice. And Mr. Banks is not precluded from obtaining competent counsel, from Indiana or elsewhere.

CONCLUSION

The Court of Appeals attempts to suggest that petitioner was concerned solely with the right of respondent to a fair trial. Petitioner was indeed concerned with the right of respondent, but petitioner was also concerned with the rights of the prosecution and the public. Petitioner submits that such broad concern is evident in his opinion where he referred to the rights of both "Mr. Banks" and "the public . . . to a fair trial and impartial trial" and also the "obligation [of the Court] . . . to provide a fair and impartial trial to all parties."

However, the Court of Appeals does address the broader question which requires a balancing of the rights of all parties and the public. The Court held "before a trial court may properly limit the defendant's right to a chosen counsel, there must be sufficiently supported and specific findings of fact that the conduct of the defendant's attorney creates a serious and imminent threat of 'significant

prejudice to the defendant himself' or of 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' "

The Court of Appeals relies only on two cases to resolve the free speech-fair trial-right to counsel issues. *Magee* v. *Superior Court of City & County of San Francisco*, 506 P.2d 1023 (1973); *Chase* v. *Robson*, 435 F.2d 1059 (7th Cir. 1970). Petitioner submits that the Court's combination of the holdings of those two cases is clearly erroneous. The conclusion based on *Chase* that an attorney's conduct must be specifically found to have a "serious and imminent threat" to a fair trial is a misplaced reliance on the law governing free speech of persons other than lawyers in a pending case. This Court in *Sawyer* and *Sheppard* clearly indicated that the conduct of lawyers participating in a pending case is subject to a different standard. Furthermore, the Court of Appeals abandoned the lesser standard it had previously recognized in *Chase*, that certain conduct may be assessed in terms of having a "reasonable likelihood" of threatening a fair trial and the administration of justice. That was the standard established in the 10th Circuit in *Tijerino*. With respect to the Court's reliance on *Magee*, it is true that the court in that case did recognize that conduct of a lawyer is an appropriate consideration in determining his admission *pro hac vice*, but the Court was not in fact concerned with any conduct of counsel and did not state that lawyer conduct when in issue must be measured in terms of whether it poses a serious and imminent threat to a fair trial.

In summary it is submitted that the court below decided a question in conflict with this Court's decisions in *Sawyer* and *Sheppard*, that the decision below is in conflict with the appellate court of another circuit, viz., *Tijerino*, and to the extent this Court has not by its prior opinions specifically sanctioned the rules regarding conduct of counsel

in pending criminal cases there are presented important questions of federal law, which have not been, but should be settled by this Court.

The relief petitioner seeks is a reversal of the decision of the Court of Appeals, a declaration that the rules of court and ethical standards involved are constitutional, and a finding that petitioner was acting within his discretion in denying Mr. Kunstler leave to appear *pro hac vice* on the grounds of the delays attributable to Mr. Kunstler and his violation of court rules and ethical standards relating to pretrial publicity.

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EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO COUNCIL OF LAWYERS, ET AL.,
Plaintiffs,
v.
WILLIAM J. BAUER, ET AL.,
Defendants,
TERENCE MACCARTHY, ET AL.,
Intervenors.
No. 70 C 2194

MEMORANDUM AND ORDER ON DEFENDANTS' AND INTERVENORS' MOTIONS

The Chicago Council of Lawyers, an association of local lawyers, and seven of its attorney members have filed this action for declaratory judgment and injunction seeking a finding that Rule 1.07 of the Local Criminal Rules of this court and Disciplinary Rule DR 7-107 of the American Bar Association Code of Professional Responsibility (collectively referred to as the no-comment rules) are facially unconstitutional as violative of the plaintiffs' first amendment rights.[1] The no-comment rules prohibit the release of information by counsel in connection with pending criminal jury cases, "if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice." Local Rule 1.07 (a). A.B.A. Disciplinary Rule DR 7-107(G) extends these principles to civil cases.[2]

[1] The plaintiffs allege that Local Rule 8 and the November, 1965 Policy Statement issued by the judges of this court are intended to incorporate the A.B.A. Disciplinary Rules. For purposes of this memorandum, the court will assume *arguendo* that this interpretation is correct.

[2] The "reasonable likelihood" standard, adopted in Section (a) of Local Rule 1.07, clearly applies to all succeeding paragraphs. Section (a) was

The complaint has two counts: Count I is on behalf of plaintiff's individually while Count II is a purported class action brought on behalf of all similarly situated attorneys. Certain criminal defense lawyers were granted leave to intervene and presently have before the court a motion to have themselves declared the proper representatives of the subclass of attorneys defending criminal cases. Both the intervenors and the defendants have moved to dismiss for failure to state a claim upon which relief can be granted.[3] For the reasons herein stated, the court grants the motions of intervenors and defendants to dismiss. In light of this disposition, the procedural questions raised by the intervenors need not be reached.

A fundamental tenet of our system of justice is "that conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence. . . ." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). The right to a fair and impartial adjudication extends not only to criminal defendants but also to the government and, through it, to society. *Cf. Williams v. Florida*, 399 U.S. 78, 82 (1970); *North Carolina v. Pearce*, 395 U.S. 711, 721 n. 18 (1969); *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir.), *cert. den.*, 396 U.S. 990 (1969); *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225, 231 (1968). Yet, in recent years, it has become increasingly evident that this fundamental right has been seriously threatened by excessive and prejudicial publicity.

Against this background, the Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333 (1961), directed district courts to seek an accommodation between the competing constitutional guarantees of fair trial and free speech. In clear and unequivocal language, the Court declared:

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expressly intended to state the broad principle underlying the specific restrictions contained in Sections (b) through (e). Likewise, the standard was clearly the underlying theory upon which the A.B.A. Disciplinary Rules were promulgated. Advisory Committee on Fair Trial and Free Press, ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press*, 84-85, Tentative Draft (1966).

[3] The American Bar Association, as amicus curiae, has submitted a brief in support of the motions to dismiss.

"The courts *must* take such steps by *rule and regulation* that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only *subject to regulation, but is highly censurable and worthy of disciplinary measures.*" (Emphasis added.) 384 U.S. 363.

With respect to extrajudicial disclosures by counsel, the Court was quite explicit:

"More specifically, *the trial court might well have proscribed extrajudicial statements by any lawyer,* party, witness, or court official *which divulged prejudicial matters,* such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." (Emphasis added.) 384 U.S. 361.

The efforts of the courts and the bar to implement these mandated directives culminated in the adoption of the currently challenged rules.[4]

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[4] The *Sheppard* decision generated a series of major studies designed to develop a practical solution to the fair trial-free speech dilemma. Among the most significant were: (1) Advisory Committee on Fair Trial and Free Press, ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press*—Tentative Draft (1966), Approved Draft (1968) [hereinafter cited as the Reardon Report]; (2) Committee on the Operation of the Jury System, Judicial Conference of the United States, *Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue* (Sept., 1968), reported in 45 F.R.D. 391 [hereinafter cited as the Kaufman Report]; (3) Association of the Bar of the City of New York, Special Committee on Radio, Television, and the Administration of Justice, *Freedom of the Press and Fair Trial, Final Report with Recommendations* (1967) [hereinafter cited as the Medina Report].

II. CRIMINAL JURY TRIALS

The plaintiffs contend that there are four respects in which the no-comment rules, as applied to criminal jury trials, exceed the minimum restraint required to assure a fair and impartial jury trial and are thus facially unconstitutional.

Plaintiffs first argue that the failure of the rules to provide for the employment of traditional protective devices, in lieu of partially silencing attorneys, renders them unconstitutional.[5] Initially, it must be remembered that such devices, unlike the challenged rules, are not preventive measures, but merely attempts to overcome the effects of prejudicial publicity once it has occurred. As the court in *Sheppard* was careful to point out, "the cure lies in those remedial measures that will *prevent* the prejudice at its inception." (Emphasis added.) 384 U.S. 333, 363.

Measured against the no-comment rules, these traditional techniques are clearly inadequate. Continuances, of course, are in conflict with the Sixth Amendment guarantee of a speedy trial. Changes of venue compel defendants to sacrifice their constitutional right to trial in the locale in which the crime took place. Further, neither these devices nor cautionary instructions can negate the effect of prejudicial publicity once it has permeated the proceedings. Sequestration of the jury is equally inadequate. If it is ordered

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This court has found the recommndations of the Kaufman Report to be particularly persuasive. The report was prepared by a committee of 12 federal court judges, chaired by Judge Edward T. Gignoux of Maine, and was ultimately adopted by the Judicial Conference of the United States. In it, the committee specifically recommended the implementation of local court rules designed to control the release of prejudicial information by attorneys on penalty of disciplinary action. 45 F.R.D. 401. In substantial portion, Local Rule 1.07 was drawn verbatim from the suggested rules prepared by the committee. It is especially significant that, after circulating the report to all federal judges, the committee reported, "[t]he individual and collective opinions of federal judges . . . overwhelming reflected general satisfaction with all recommendations of the report." 45 F.R.D. 400.

[5] Traditional protective devices include continuances, changes of venue, cautionary instructions and sequestration.

because of the jurors' exposure to prejudicial publicity before trial, irremediable damage may have already been done. Sequestration is generally viewed as an undesirable last resort by defense counsel (Intervenor's Br. 24) and may itself prejudice the defendant because of the inconvenience and annoyance it causes jurors. It should not be invoked merely to permit attorneys to disseminate prejudicial publicity. *See Reardon Report,* 73-76.

Plaintiffs next contend that the rules are unconstitutionally overbroad because they fail to draw any distinction between comments favorable to the criminal defendant and those which are hostile. Admittedly, the publicity problem in the main has been one of prosecutorial excesses. *Reardon Report,* 37, 42-45. However, this does not permit the court to assume that defense counsel's comments would be non-prejudicial to the prosecution even though merely favorable to the defendant. Indeed, the report of a New York City Bar Association committee, chaired by Judge Harold R. Medina, indicated that it is not uncommon for defense counsel to actively generate publicity which may taint the impartiality of a tribunal. *See Medina Report,* 43-55; *Reardon Report,* 42-43, 175: *United States ex rel. Bloeth v. Denno,* 313 F.2d 364, 378-79 (2nd Cir.) (dissent), *cert. den.,* 372 U.S. 978 (1963); *Sheppard v. Maxwell, supra,* 361. The adoption of the onesided approach urged by the plaintiffs would ignore the correlative interest of society in a fair trial. Any limitation of prejudicial comment should apply to any attorney bent on securing improper advantage. *State v. Van Duyne,* 43 N.J. 368, 204 A.2d 841, *cert. den.,* 380 U.S. 987 (1969); *State v. Kavanaugh, supra.*

Plaintiffs' third objection is that the rules constitute a "prior restraint" of first amendment rights and must be judged accordingly. *See Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971); *New York Times Co. v. United States,* 403 U.S. 713 (1971). However, unlike the cited cases, the instant situation does not impose a blanket prohibition on all speech irrespective of content. Rather, the challenged rules seek only to punish speech from which prejudice is reasonably likely to result. They impose a responsibility on those who violate them as do the laws on

slander, libel and obscenity. The rules are therefore clearly not a prior restraint.

Finally, plaintiffs attack the rules on the ground that they are not predicated upon a "clear and present danger" of prejudicial effect, but rather employ the lesser standard of "reasonable likelihood." In support of this proposition, they cite *Bridges v. California*, 314 U.S. 252 (1941), *Pennekamp v. Florida*, 328 U.S. 331 (1946), *Craig v. Harney*, 331 U.S. 367 (1947), and *Wood v. Georgia*, 370 U.S. 375 (1962). It is the opinion of this court that neither the Constitution nor the cited case law supports plaintiffs' conclusion.

Bridges and its progeny are more accurately cited for the proposition that, where no "judicial proceeding [is] pending," the First Amendment rights of the press and private citizens cannot be proscribed by court order without a serious and imminent threat to the administration of justice. *Bridges v. California, supra* at 263. This court, however, cannot accept the notion that these principles must be extended to lawyers participating in on-going litigation.

Additionally, this court takes cognizance of significant factual differences which distinguish the *Bridges-Wood* line of decisions from the situation now before the court. Each of the cases cited by the plaintiffs was concerned with defining the permissible scope of the contempt power, "a common law concept of the most general and undefined nature." *Bridges v. California, supra* at 260. None dealt with the violation of a narrowly drawn statute or court rule which seeks to accommodate competing constitutional interests.

The Supreme Court has made it abundantly clear that review of convictions will differ drastically from review of statutory violations, where the need for regulation has been buttressed by prior legislative deliberations. *Bridges v. California, supra* at 260-61; *Wood v. Georgia, supra* at 386. In the later situation, great deference is accorded to the judgment of the legislature. *See, e.g., Dennis v. United States*, 341 U.S. 494 (1951); *Barenblatt v. United States*,

360 U.S. 109 (1959). In view of the extensive deliberations which preceded the promulgation of the challenged rules, see footnote 4, *supra*, it is evident that they must be judged by standards analogous to those applied to legislative action. Thus, having reached the court "encased in the armour wrought by prior legislative deliberation," *Bridges v. California, supra* at 261, these rules should not be overturned lightly.

Perhaps the most effective distinction may be drawn from the language of *Wood* itself. There, as in *Bridges, Pennekamp,* and *Craig,* the Court was dealing with hostile remarks directed at judges or the general administration of justice. This must be distinguished from the situation where the communication might prejudice a pending trial. The court noted at p. 389-90:

> "[I]t is important to emphasize that this case does not represent a situation where an individual is on trial; there was no 'judicial proceeding pending' in the sense that prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or a grand jury proceeding. . . . Moreover, we need not pause here to consider the variant factors that would be present in a case involving a petit jury. *Neither Bridges, Pennekamp nor Harney involved a trial by jury.* In Bridges, it was noted that 'trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper' (314 U.S., at 271), *and of course the limitations on free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation.*" (Emphasis added.)

In *In Re Sawyer,* 360 U.S. 622 (1959), the Supreme Court was confronted with a problem similar to the one present here. During the pendency of a criminal case, one of the trial counsel made a public speech construed by the Supreme Court of Hawaii as an attack on the fairness and impartiality of the federal district court judge presiding over the trial. As a result, the Hawaii Supreme Court found Mrs. Sawyer guilty of gross misconduct and sus-

pended her from practice for one year. In a five to four decision, the United States Supreme Court reversed Mrs. Sawyer's suspension, on the ground that the findings upon which the suspension rested were not supported by the evidence. The dissent emphasized the proposition that the First Amendment rights to active trial counsel were significantly less immune from restriction than those of other private citizens or the media.

In the course of his opinion for the dissenters, Justice Frankfurter stated at 668:

> "Here was a public meeting addressed by counsel for the defense, haranguing a crowd on the unfairness to the defendant of the proceedings in court, with the high probability indeed almost certainty under modern conditions that the goings-on of the meeting would come to the attention of the presiding judge and the jury. It took place in a case in which public interest and public tempers had been aroused. When the story of the meeting came to the attention of the judge, he felt obliged publicly to defend his conduct. *It is hard to believe that this Court should not hold that a member of the legal profession is constitutionally entitled to remove his case from the court in which he is an officer to the public and press, and express to them his grievances against the conduct of the trial and the judge.* 'Legal trials,' said this Court, 'are not like elections, to be won through the use of the meeting-hall, the radio and the newspaper.' [citing *Bridges, supra,* 271]
>
> "*Even in the absence of the substantial likelihood that what was said at a public gathering would reach the judge or jury, conduct of the kind found here cannot be deemed to be protected by the Constitution.* An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an "officer of the court" in the most compelling sense. He does not lack for a forum in which to make his charges of unfairness or failure to adhere to principles of law; he has ample chance to make such claims to the courts in which he litigates. As long as any tribunal

bred in the fundamentals of our legal tradition, ultimately this Court, still exercises judicial power those claims will be heard and heeded." (Emphasis added.)

Justice Stewart concurred in the reversal but solely on the basis that the evidence was insufficient. His carefully limited concurrence demonstrates that he agreed with the constitutional principles articulated by Justice Frankfurter:

> "If, as suggested by my Brother Frankfurter, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from evenhanded discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> "*Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.* (Emphasis added.) 360 U.S. 646.

When considered together, the views expressed in the dissent and Justice Stewart's concurring opinion at least stand for the proposition that the First Amendment does not immunize trial counsel from discipline for public statements which might affect the fairness of a pending case, see *Sheppard v. Maxwell, supra* at 363, and raises substantial doubt as to the viability of the "clear and present danger" test as a measure of protected speech in that context. Neither the "clear and present danger" test nor the rulings in *Bridges, Pennekamp,* or *Craig* were intimated as controlling.[6]

Some of these very issues were recently considered in *United States v. Tijerina, supra.* There, the court reviewed

[6] Of particular note is Justice Frankfurter's statement that even in the absence of a "substantial likelihood" of court exposure to the declarations, Mrs. Sawyer's conduct remained constitutionally unprotected. *See* Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenberg—and Beyond,* 1969 S. Ct. Rev. 41.

a criminal contempt conviction arising from public statements made by defendants in violation of a pre-trial order prohibiting comments by all attorneys and defendants. The defendants asserted that the order was invalid since it was not based upon a clear and present danger to the administration of justice. The Tenth Circuit rejected defendants' argument, stating at p. 666:

> "We believe that reasonable likelihood suffices. The Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial."

Accord, In Re Sawyer, 260 F.2d 189 (9th Cir. 1958), *rev'd on other grounds,* 360 U.S. 622 (1959); *State v. Van Duyne, supra; Hamilton v. Municipal Court,* 76 Cal. Rptr. 168 (1st Dist.), *cert. den.,* 396 U.S. 985 (1969); *Kaufman Report,* 404-7; *Reardon Report,* 93.

Accordingly, it is the judgment of this court that a "clear and present danger" to the fair administration of justice is not the required standard to be used in measuring the constitutionality of court rules proscribing the dissemination of prejudicial remarks by active trial counsel.

In the final analysis, the right of trial counsel to comment on pending criminal proceedings must be weighed against the right of individual defendants and society to a fair and impartial trial. As the Supreme Court has repeatedly indicated, "the societal value of speech must, on occasion, be subordinated to other values and considerations." *Dennis v. United States, supra,* 503. In such cases, the court must weigh the individual and societal interest in freedom of expression against the societal interest in the result which the regulation may achieve. *See, e.g., Breard v. Alexandria,* 341 U.S. 622 (1951); *Dennis v. United States, supra; Rowan v. Post Office,* 397 U.S. 728 (1970).

Upon examination of the interests asserted by plaintiffs, this court finds them to be neither compelling nor evident. Initially, it is important to observe that the challenged rules do not establish a blanket prohibition on all speech.

Attorneys may quote from or refer to the public record, request assistance in obtaining evidence, release the facts surrounding the time and place of the arrest, as well as announce that the accused denies the charges against him. A.B.A. Disciplinary Rule DR 7-107(B). Furthermore, it is apparent from even the briefest survey of the situation that the public's right to know is not substantially impaired. *See Red Lion Broadcasting Co. v. F.C.C.* 395 U.S. 367 (1969). The media, as well as private citizens, remain unrestrained in their ability to comment on pending proceedings. Only the voices of participating attorneys are stilled, and then only if the statements present a reasonable likelihood of prejudicing the judicial process.

Nor can it be contended that participating attorneys have a proper interest in publicly discussing matters not of record that could affect the outcome of the litigation. Any such statements invite the fact finder to weigh these considerations in addition to or in disregard of the evidence presented at trial. A courtroom "is a place for trial of defined issues in accordance with law and rules of evidence, with standards of demeanor for court, jurors, parties, witnesses and counsel." *In Re Dellinger,* 461 F.2d 389, 401 (7th Cir. 1972). The injection of prejudicial remarks would remove justice from its proper forum, to the advantage of those skilled in manipulating the media and the public.

Moreover, in the process of accommodating the fair trial guarantee with other constitutional rights, the Supreme Court has indicated that the former must prevail:

> "We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs. Our approach has been through rules, contempt proceedings and reversal of convictions obtained under unfair conditions. Here the remedy is clear and certain of application and it is our duty to continue to enforce the principles that from time immemorial have proven efficacious and necessary to a fair trial." *Estes v. Texas,* 381 U.S. 532, 540-41 (1965). *See United States v. Tijerina, supra.*

Finally, in light of *Sheppard v. Maxwell, supra*, the "reasonable likelihood" standard is mandatory. There, the Supreme Court established the principle that criminal defendant need only show a probability of prejudicial circumstances to obtain reversal of his conviction. If convictions are to be overturned on a showing that publicity *probably affected* the outcome, attempts by court rule to forestall such prejudice must be judged by the same standard. To adopt a more lenient guideline would allow unprincipled attorneys to frustrate the judicial process with impunity and thus ignore the command of the Supreme Court in *Sheppard*, to deal with the problem by "rule and regulation."[1] *See United States v. Tijerina, supra; State v. Van Duyne, supra; Hamilton v. Municipal Court, supra.*

II. CIVIL JURY TRIALS

Plaintiffs argue that A.B.A. Disciplinary Rule DR 7-107 (G) is unconstitutionally overbroad because it extends the restraints of the no-comment rules to civil jury cases. Plaintiffs base their contention upon the following reasoning: major social and political issues are likely to find their way into the federal courts; intelligent discourse on these issues is vital to society's interests; attorneys involved in such litigation can make significant contributions to these discussions; thus participating counsel should be unfettered in their discussion of pending civil cases.

Yet, the need for rational resolution of disputes in accordance with the law and rules of evidence is no less compelling in civil litigtaion than in criminal trials. "The very purpose of a court system is to adjudicate controversies, *both criminal and civil*, in the calmness and solemnity of the courtroom according to legal procedures." (Emphasis added.) *Cox v. Louisiana*, 379 U.S. 559, 583-84 (1965)

[1] Plaintiffs' reliance on *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970) and *In Re Oliver*, 452 F.2d 111 (7th Cir. 1971) is misplaced. In *Chase*, the Seventh Circuit specifically declined to rule on the issue. Similarly, in *Oliver*, the court's decision was premised upon the unconstitutionality of this District's policy statement of November, 1965. No opinion was expressed as to the propriety of the "reasonable likelihood" standard.

(Black J., dissening). Many of the reasons which established the constitutionality of the no-comment rules as applied to criminal jury trials also support the conclusion that A.B.A. Disciplinary Rule DR 7-107(G) is not overbroad. See Section I, *supra*.[8]

III. CIVIL AND CRIMINAL BENCH TRIALS

Finally, plaintiffs argue that the no-comment rules are overbroad because they fail to distinguish between jury and bench trials. Although the need for these restrictions may be more acute in the jury context, and although the challenged rules emanated from abuses arising therein, this does not mean that the possibility for prejudice is nonexistent at bench trials. Speaking in an analogous context, the Supreme Court has recognized:

> "that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges . . . and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of trial." *Cox v. Louisiana, supra* at 565.[9]

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[8] No weight should be attributed to the failure of the various study committees, *see* note 4 *supra*, to make recommendations concerning civil cases, as such matters were beyond the scope of the committee undertakings.

[9] Justice Frankfurter had earlier noted that out-of-court comment might affect judicial perceptions:

> "A powerful newspaper admonished a judge, who within a year would have to secure popular approval if he desired continuance in office, that failure to comply with its demands would be 'a serious mistake.' . . . If such a sentence had been imposed, readers might assume that the court had been influenced in its action; if lesser punishment had been imposed, at least a portion of the community might be stirred to resentment. It cannot be denied that even a judge may be affected by such a quandary." *Bridges v. California, supra* at 299-300.

While the tenure of federal judges protects them from electoral ramifications of their decisions, the manner in which a judge views a case may be affectd by statements sought to be proscribed.

IV. ORDERS OF THE COURT

It is therefore ordered that:

1. In view of the following disposition, the Intervenors' motion to have themselves declared the proper representatives of attorneys who regularly represent defendants in criminal cases in this district shall be, and the same is hereby, denied.

2. The Defendants' and Intervenor's motions to dismiss shall be, and the same are hereby, granted.

s/ Edwin A. Robson
s/ Richard B. Austin
s/ James B. Parsons
s/ Hubert L. Will
s/ Bernard M. Decker
Executive Committee

Date: February 5, 1974